

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MAR 23 2004

JAMES R. LARSEN, CLERK
~~DEPUTY~~
RICHLAND, WASHINGTON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IN RE RIVER PARK SQUARE
PROJECT BOND LITIGATION.

NO. CS-01-0127-EFS

ORDER CONSTRUING PLAINTIFFS'
JOINT MEMORANDUM BRIEF IN
OPPOSITION TO DEFENDANT FOSTER
PEPPER'S MOTION FOR SUMMARY
JUDGMENT TO ESTABLISH 10B-5
DAMAGES CAP AND PRECLUDE
RESCISSION AS A MOTION TO
RECONSIDER THE COURT'S AUGUST
1, 2003, DENYING THE MOTION TO
RECONSIDER THE COURT'S AUGUST
1, 2003, AND GRANTING FOSTER
PEPPER & SHEFFELMAN PLLC'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT TO ESTABLISH 10B-5
DAMAGES CAP AND PRECLUDE
RESCISSION

BEFORE THE COURT, without oral argument, is Defendant Foster
Pepper & Sheffelman PLLC ("Foster Pepper")'s Motion for Partial
Summary Judgment to Establish 10b-5 Damages Cap and Preclude
Rescission, (Ct. Rec. 1066). The motion is joined by Citizens Realty,
Lincoln Investment Company, Preston Gates & Ellis, RPS II, L.L.C.,
R.W. Robideaux and Company, Spokane Downtown Foundation, and Walker
Parking Consultants/Engineers, (taken together "Defendants"). The
Court reviewed the motions, memoranda, accompanying materials, the
August 1, 2003, Order, (Ct. Rec. 869), the applicable case law and is

1 fully informed. The Court construes the Plaintiffs' Joint Memorandum
2 Brief in Opposition to Defendant Foster Pepper's Motion for Summary
3 Judgment to Establish 10b-5 Damages Cap and Preclude Rescission, (Ct.
4 Rec. 1228), as a Motion to Reconsider the Court's August 1, 2003,
5 Order, (Ct. Rec. __). The Court **denies** the Motion to Reconsider and
6 **grants** Foster Pepper's Motion for Partial Summary Judgment.

7 I. PROCEDURAL BACKGROUND

8 On July 23, 2003, the Court heard argument on Defendant Foster
9 Pepper's Motion for Summary Judgment Re: 10b-5 Damage Claims, (Ct.
10 Rec. 799). The Court also considered the Bond Fund Plaintiffs' Cross-
11 Motion for Summary Judgment Re 10b-5 Damages, (Ct. Rec. 810). At the
12 July 23, 2003, hearing, the Court granted Foster Pepper's motion, in
13 part, and denied the Bond Fund Plaintiffs' motion. On August 1,
14 2003, the Court issued a written order that memorialized and
15 supplemented the oral rulings of the Court.

16 In the Order, the Court held Section 78u-4(e) is the exclusive
17 method for determining the "true value" of a security in the absence
18 of any fraudulent misrepresentations, and that its use is mandatory in
19 calculating out-of-pocket loss damages in a 10b-5 case. The Court
20 granted partial summary judgment to that effect, but denied dismissal
21 of the Plaintiffs' 10b-5 claims to permit the Plaintiffs to produce a
22 damages estimate. In addition, the Court held Plaintiffs cannot obtain
23 rescission under 10b-5 from a party with which it was not in privity.

24 Plaintiffs' damages expert, Mr. Leslie A. Patten, subsequently
25 calculated the Bond Fund Plaintiffs' 10b-5 damages under the Private
26 Securities Litigation Reform Act ("PSLRA") cap at \$4.87 million and

1 the individual bondholder's 10b-5 damages at \$442,260.63. Foster
2 Pepper moves the Court to enter an order formally capping Bond Fund
3 and Individual Plaintiffs' damages at the respective amounts.
4 Further, the Defendants move the Court for an Order precluding
5 rescission against parties not in privity with the Plaintiffs.

6 **II. PLAINTIFFS' JOINT OPPOSITION MEMORANDUM**

7 In their Joint Memorandum Brief in Opposition to Defendant Foster
8 Pepper's Motion for Summary Judgment to Establish 10b-5 Damages Cap
9 and Preclude Rescission, Plaintiffs argue "the Court should reconsider
10 its earlier ruling," (Ct. Rec. 1228, P. 3). Plaintiffs argue that a
11 trial court is always free to reconsider its earlier decisions.
12 Accordingly, the Court construes the Joint Memorandum Brief in
13 Opposition to Defendant Foster Pepper's Motion for Summary Judgment to
14 Establish 10b-5 Damages Cap and Preclude Rescission, (Ct. Rec. 1228),
15 as a Motion to Reconsider the Court's August 1, 2003, Order.

16 **III. MOTION TO RECONSIDER**

17 Courts have generally recognized only four possible grounds for
18 reconsideration: (1) evidence in the record clearly establishes a
19 manifest error of law or fact on which the judgment was based, (2)
20 newly discovered evidence that was previously unavailable; (3)
21 prevention of manifest injustice, and (4) an intervening change in
22 controlling law. See, e.g., *Matter of Prince*, 85 F.3d 314 (7th Cir.
23 1996); *Sch. Dist. No. 1J, Multnomah County, Or. v. Acands, Inc.*, 5
24 F.3d 1255, 1263 (9th Cir. 1993); *NL Indust., Inc. v. Commercial Union*
25 *Ins. Co.*, 935 F. Supp. 513 (D.N.J. 1996); *Demasse v. ITT Corp.*, 915 F.
26 Supp. 1040 (D. Ariz. 1995).

1 Plaintiffs' Joint Memorandum Brief in Opposition to Defendant
2 Foster Pepper's Motion for Summary Judgment to Establish 10b-5 Damages
3 Cap and Preclude Rescission fails to identify which, if any, ground is
4 satisfied in this case for reconsideration of this Court's prior
5 order. The Plaintiffs' memorandum tracks, almost exactly, its
6 original memorandum in support of its cross-motion for summary
7 judgment, (Ct. Rec. 810). The Court finds that it did not commit
8 manifest error of law or fact, the sole ground for reconsideration to
9 which Plaintiffs' motion appears directed. The Court therefore denies
10 the motion.

11 IV. STANDARD FOR SUMMARY JUDGMENT

12 Summary judgment will be granted if the "pleadings, depositions,
13 answers to interrogatories, and admissions on file, together with the
14 affidavits, if any, show that there is no genuine issue as to any
15 material fact and that the moving party is entitled to judgment as a
16 matter of law." FED. R. CIV. P. 56(c). When considering a motion for
17 summary judgment, a court may not weigh the evidence nor assess
18 credibility; instead, "the evidence of the non-movant is to be
19 believed, and all justifiable inferences are to be drawn in his
20 favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A
21 genuine issue for trial exists only if "the evidence is such that a
22 reasonable jury could return a verdict" for the party opposing summary
23 judgment. *Id.* at 248. In other words, issues of fact are not
24 material and do not preclude summary judgment unless they "might
25 affect the outcome of the suit under the governing law." *Id.* There
26 is no genuine issue for trial if the evidence favoring the non-movant

1 is "merely colorable" or "not significantly probative." *Id.* at 249.

2 If the party requesting summary judgment demonstrates the absence
3 of a genuine material fact, the party opposing summary judgment "may
4 not rest upon the mere allegations or denials of his pleading, but . .
5 . must set forth specific facts showing that there is a genuine issue
6 for trial" or judgment may be granted as a matter of law. *Anderson*,
7 477 U.S. at 248. This requires the party opposing summary judgment to
8 present or identify in the record evidence sufficient to establish the
9 existence of any challenged element that is essential to that party's
10 case and for which that party will bear the burden of proof at trial.
11 See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Failure to
12 contradict the moving party's facts with counter affidavits or other
13 responsive materials may result in the entry of summary judgment if
14 the party requesting summary judgment is otherwise entitled to
15 judgment as a matter of law. See *Anderson v. Angelone*, 86 F.3d 932,
16 934 (9th Cir. 1996).

17 **V. FOSTER PEPPER'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

18 Foster Pepper moves the Court to enter an order capping the Bond
19 Fund Plaintiffs' 10b-5 damages at \$4.87 million and the individual
20 bondholder's 10b-5 damages at \$442,260.63. Further, the Defendants
21 move the Court for an Order precluding rescission against parties not
22 in privity with the Plaintiffs. The Court finds the requested relief
23 to be consistent with its August 1, 2003, Order and grants Foster
24 Pepper and the joining Defendants' motion for partial summary
25 judgment.

26 Accordingly,

1 **IT IS HEREBY ORDERED:**

2 1. The Court **CONSTRUES** the Plaintiffs' Joint Memorandum Brief in
3 Opposition to Defendant Foster Pepper's Motion for Summary Judgment to
4 Establish 10b-5 Damages Cap and Preclude Rescission, (Ct. Rec. 1228),
5 as a **Motion to Reconsider the Court's August 1, 2003, Order**, (Ct. Rec.
6 ___).

7 2. Plaintiffs' Motion to Reconsider the Court's August 1, 2003,
8 Order, (Ct. Rec. ___), is **DENIED**.

9 3. Defendant Foster Pepper & Sheffelman PLLC's Motion for
10 Partial Summary Judgment to Establish 10b-5 Damages Cap and Preclude
11 Rescission, (Ct. Rec. 1066), is **GRANTED**.

12 4. **The Bond Fund Plaintiffs' 10b-5 damages are capped at**
13 **\$4,870,000.**

14 5. **The Individual Bondholder's 10b-5 damages are capped at**
15 **\$442,260.63.**

16 6. Rescission, as a 10b-5 remedy, is limited **ONLY** to parties in
17 privity with the Plaintiffs.

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1 **IT IS SO ORDERED.**

2 The District Court Executive is directed to:

3 (1) **Docket** Plaintiffs' Joint Memorandum Brief in Opposition to
4 Defendant Foster Pepper's Motion for Summary Judgment to
5 Establish 10b-5 Damages Cap and Preclude Rescission, (**Ct. Rec.**
6 **1228**), as a **Motion to Reconsider the Court's August 1, 2003,**
7 **Order;**

8 (2) Enter this Order;

9 (3) Furnish copies to counsel.

10 **DATED** this 23rd day of March 2004.



EDWARD F. SHEA
United States District Judge